

In The Matter Of:
United States vs.
PFC Bradley E. Manning

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July 18, 2013
UNOFFICIAL DRAFT - 7/18/13 Morning Session

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VOLUME XIX
IN THE UNITED STATES ARMY
UNITED STATES
VS.
MANNING, Bradley E., PFC COURT-MARTIAL
U.S. Army, xxx-xx-9504
Headquarters and Headquarters Company,
U.S. Army Garrison,
Joint Base Myer-Henderson Hall,
Fort Myer, VA 22211
_____ /

The Hearing in the above-titled matter was
held on Thursday, July 18, 2013, at 9:30 a.m., at
Fort Meade, Maryland, before the Honorable Colonel
Denise Lind, Judge.

DISCLAIMER

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1 **APPEARANCES:**

2
3 **ON BEHALF OF GOVERNMENT:**

4 MAJOR ASHDEN FEIN

5 CAPTAIN JOSEPH MORROW

6 CAPTAIN ANGEL OVERGAARD

7 CAPTAIN HUNTER WHYTE

8 CAPTAIN ALEXANDER van ELTEN

9
10 **ON BEHALF OF ACCUSED:**

11 DAVID COOMBS

12 CAPTAIN JOSHUA TOOMAN

13 MAJOR THOMAS HURLEY

1 PROCEEDINGS,

2 THE COURT: Court is called to order. Mr.
3 Fein, please account for the parties.

4 MAJOR FEIN: Ma'am, all parties since the
5 Court last recessed are again present with the
6 following exception. Captain Overgaard is absent.
7 Captain von Elten is present.

8 Also, Ma'am, as of 9:15 this morning,
9 there are 27 members of the media, at the Media
10 Operations, one stenographer, no media in the
11 courtroom, 25 spectators in the courtroom and three
12 spectators in the overflow trailer.

13 THE COURT: All right. Thank you. Would
14 the parties like to identify any new exhibits that have
15 been added to the record?

16 MAJOR FEIN: Yes, Ma'am. On 17 July 2013,
17 United States filed its brief on C641, its targeted
18 brief for the RCM 917 litigation, and that has been
19 marked as Appellate Exhibit 606.

20 Also, Appellate Exhibit 607 is a
21 submission of one internet printout from Amazon.com

1 related to the David Finkel book. And what's been
2 marked as Appellate Exhibit 608 is an email from Mr.
3 Coombs, subjects additional case for Defense filing in
4 reference to the RCM 917 motion for the 18 USC 641 --

5 THE COURT: All right. Thank you. The
6 Court is prepared to rule on two of the Defense motions
7 for findings of Not Guilty under RCM 917. That would
8 be for the offenses of specification of Charge One,
9 Article 104 and Specification 13 of Charge 2, which
10 would be fraud and related activity with computers in
11 violation of 18 United States Code, Section 1030A1 and
12 Article 134.

13 (Court Reading from document)

14 All right. We have some issues with
15 respect to judicial notice. Government.

16 MAJOR FEIN: Yes, Ma'am. In our last
17 session the United States moved for the Court to take
18 judicial notice of the entire Finkel book under the
19 theory that, if the Defense is going to argue that Pfc
20 Manning read any portion of the book, that the entire
21 book should be judicially noticed.

1 So the United States has marked as
2 Prosecution Exhibit 186 for identification the entire
3 David Finkel book.

4 THE COURT: Do you intend to capture this
5 for the record of trial, if I admit it?

6 MAJOR FEIN: Ma'am, the united States, if
7 that book is admitted, that these files be broken and
8 it be put into a normal 8 and a half by 11 pages, put
9 in the record.

10 THE COURT: All right. Defense.

11 MR. COOMBS: Your Honor, the Court has
12 taken judicial notice of the existence of the book.
13 Defense's position on this is that the Government now,
14 by asking the Court to put the entire book in the
15 record, there would be 104B determination that the
16 Court would have to make.

17 That would be, first, on relevance is
18 there evidence to show Pfc Manning read the book. The
19 Defense's position is that the book came out in
20 September of 2009. Pfc Manning deployed a month later
21 than that.

1 When you look at the PE30, the Lamo
2 chats, it is clear that Pfc Manning is referencing the
3 Washington Post and David Finkel. And Defense's
4 position is that he learned of the excerpts from the
5 video and Finkel's book from the internet, not from
6 David Finkel's actual book.

7 For that we have asked the Court to take
8 judicial notice of Defense Exhibit, I believe it's
9 Hotel Hotel, which is a Washington Post article dated
10 15 September 2009.

11 In that article it quotes a excerpt from
12 the video. So the Defense's position is that is where
13 Pfc Manning would have learned of the video's content
14 being quoted by Mr. Finkel, as opposed to the actual
15 book.

16 So we would request the Court to take
17 judicial notice of Defense Exhibit Hotel Hotel. With
18 regards to the actual book, even though the Court has
19 taken judicial notice of the book, the Government
20 should, if there's a particular excerpt or whatnot from
21 that book, they should be forced to indicate what

1 excerpt they want instead of the entire book. And then
2 we can litigate relevance of that.

3 THE COURT: All right. I notice Mr.
4 Finkel is not on either side's witness list.

5 MAJOR FEIN: No, Ma'am. That is correct
6 ma'am.

7 THE COURT: All right. I have already
8 taken judicial notice of the book. I'm going to take
9 judicial notice of the entire book. I'll also take
10 judicial notice of the Washington Post article. You
11 can make any arguments that you wish to make with
12 respect to whether the inferences are that you read the
13 book, you didn't read the book, you read the article,
14 you didn't read the article, and present that to the
15 fact finder.

16 So Prosecution Exhibit 186 is admitted,
17 as is Defense Exhibit Hotel Hotel.

18 Is there anything else we need to
19 address before we proceed to the arguments with respect
20 to the 641, 18 United States Code, Section 641
21 offenses?

1 MAJOR FEIN: No, Ma'am.

2 MR. COOMBS: If we could take just a ten
3 minute break before we go into argument.

4 THE COURT: All right. Why don't we make
5 that 15 minutes. The Court will recess until 20
6 minutes after 10:00.

7 (Brief Recess)

8 THE COURT: Court is called to order. All
9 parties present when the Court last recessed are again
10 present in Court.

11 Mr. Fein, are you ready to proceed?

12 MAJOR FEIN: Yes, Your Honor.

13 MR. COOMBS: And, Your Honor, what I would
14 like to do is address the GALs separately. So handle
15 the 641 specifications, let the Government respond to
16 that and then separately argue.

17 THE COURT: That's fine.

18 MR. COOMBS: The Defense's position on
19 this is that the Government has never charged the
20 correct property in this case. They have charged the
21 databases. And what they charged for each of the

1 specifications was a database and then they did the
2 qualifier of explaining what the database contained,
3 but they charged the database.

4 THE COURT: Let me ask you a question.
5 What's your definition of a database?

6 MR. COOMBS: Well, in that instance there,
7 I know the Government went to Black Letter Law --

8 THE COURT: Black's Law Dictionary.

9 MR. COOMBS: Yes. Excuse me. Or just
10 common understanding perhaps of what do I interpret
11 database to mean. The important thing, when they
12 charge database on the charge sheet, the database has a
13 meaning. In that case the meaning is the database.

14 THE COURT: The database containing
15 records.

16 MR. COOMBS: Right. That was a
17 description of what the database was. When you see the
18 word "database" and you see what they have charged in
19 this case, the CIDNE-I database, the CIDNE-A database,
20 the South Com database, those are particular things.
21 Those are items, databases.

1 And the description containing the
2 certain amount of records, that was a description of
3 what they were charged in the database, much like you
4 would charge a particular -- if a car was stolen. You
5 are charging theft of the car containing CDs or
6 containing other items.

7 But it's clear we are charging the car.
8 And when we filed our Bill of Particulars, and I'll get
9 to the Government's logic, the Defense filed a Bill of
10 Particulars. That's when you would find out what they
11 are charging and under what theory.

12 In that response they said, it is clear
13 the property at issue, namely the specific identified
14 databases. That was the Government's response. The
15 specific identified databases.

16 And the Court held, when you looked at
17 the Bill of Particulars, the Court concluded the
18 Government's response to the Defense request for the
19 Bill of Particulars was sufficient to satisfy the Bill
20 of Particulars.

21 And it's clear from their response what

1 they were alleging that he stole was the specific
2 identified databases. When you ask me, how do I
3 interpret databases, I interpret it based on the
4 Government's Bill of Particulars response, and that is
5 the specific identified databases.

6 THE COURT: How do you have a database
7 without records?

8 MR. COOMBS: Easy. I can create a
9 database that has nothing in it yet. The database is
10 simply like Westlaw. That is a database. You can have
11 a Westlaw database that doesn't have any records yet.
12 It's no less a database.

13 In this instance the Government, from
14 their instructions, they wanted to charge, and they did
15 charge, and they wanted to prove, and did try to prove
16 the value of the database.

17 So, when you look at the proposed
18 instruction by the Government. And let's use
19 Specification 4, Charge 2. The Government says in that
20 specification that the elements that this Court should
21 have instructed on is that, in this case the CIDNE-I

1 database belonged to United States Government. The
2 CIDNE-I database was a value of more than a thousand.

3 For the lesser included offense they
4 said the offense of stealing or converting the CIDNE-I
5 database of a value less than a thousand is a lesser
6 included offense of the offenses within Specification
7 4. And they did this for all the databases.

8 So it's clear that the databases what
9 the Government was proving. We know that because we
10 look at the evidence they offered. They offered
11 evidence of how much is a cost for a server, a virtual
12 server, how you create the database.

13 And we had testimony from Chief Nixon
14 about the fact, that you can have the database without
15 the information, but you can't have the information as
16 far as how it was set up in the GAL without the
17 database.

18 In this case here, when you're charging
19 the database, it's clear that that could be what they
20 were intending to prove. And, in fact, that is what
21 they charged and attempted to prove.

1 But in the Government's response, which
2 is very difficult to discern, they wanted to make it
3 seem as if it's clear to everybody involved that, when
4 they said database, that that actually applies to what
5 Pfc Manning allegedly did, in fact, take.

6 If that were abundantly clear, then you
7 wouldn't need 31 pages of motions from the Government
8 to explain that. And you wouldn't need 25 pages from
9 the Defense to say we don't understand what they are
10 alleging.

11 But it seems like the Government is
12 trying to say is that the word database encapsulates
13 everything under the sun. They want to say, when we
14 say database, what we really mean was the records in
15 the database.

16 And we say records, what we really mean
17 was the copy of the records. When we say copy of
18 records, what we really mean was the information within
19 the copy of records. When we say information, what we
20 really mean is the exclusive possession of that
21 information. That is the extent to which the

1 Government wants to extrapolate from the word database.

2 Well, the problem with that is, words
3 matter. And the Government on more than one time has
4 used that refrain, words matter. When we were asking
5 for documents from Quantico, and we thought documents
6 fairly encapsulated emails, the Government said no, no,
7 no, words matter. If you wanted emails, you should
8 have asked for emails.

9 When we said we wanted investigative
10 papers during discovery, the Government came back and
11 said, no, words matter. What you really should have
12 asked for was working papers.

13 When we say that we wanted a damage
14 assessment, what they really said was, oh, you should
15 have asked for draft or interim. That's words matter.

16 Well, words do matter. They matter the
17 most when it's on a charge sheet. That's when words
18 matter. And the Government chose to charge this way.
19 And this Court has previously held the Government's
20 feet to the fire on how they charge. When you take a
21 look at Appellate Exhibit 515, dealing with 793

1 offenses, and the Government is trying to argue, we can
2 take advantage of the information clause and we don't
3 have to prove reason to believe.

4 THE COURT: You mean documents clause.

5 MR. COOMBS: Thank you, yes. This Court
6 said, you had an option, you could have charged under
7 the documents clause or on the information clause. You
8 chose the way you charged and now you need to own the
9 way you charged it.

10 This case is no different. When you
11 look at that -- documents information. Even in the 793
12 offense there is a distinguishment between documents
13 and information.

14 In this case the Government has had over
15 a year to draft these offenses, after the initial
16 drafting when they re-preferred the charges. They
17 definitely thought through how they wanted to draft it.
18 Unfortunately this didn't read the 641 cases. If they
19 did, they would see that there is a difference between
20 a record, a copy of the record and information
21 contained in the record.

1 THE COURT: That's what I would like you
2 to focus on, Mr. Coombs. As I'm looking at the charge
3 sheet, it says, did steal, Pfc Bradley E. Manning did
4 at or near whatever, steal, purloin or knowingly
5 convert to his use, or use of another, a record or
6 thing of value of United States or department of the
7 agency thereof.

8 Specification 4 is structured the same
9 way. Combined information and network exchange Iraq
10 database containing more than 380,000 records.

11 Now I'm not going to interrupt your
12 argument. Assuming that I rule completely in your
13 favor with respect to that this doesn't encompass
14 records. Then I would like an alternate B argument,
15 assuming I find that it does, what is the Defense
16 position with respect to information value?

17 MR. COOMBS: Okay. So the first one is
18 easy. If it encompass database. When you look at
19 database, 641 cases are all the same when you see how
20 they charged the items. If it's information, like the
21 DiJulio case, Hunter, Jeeter, Jordan case, they all do

1 the copy, they charged the copy and then they charged
2 the information separately.

3 So even though the Federal Jurisdiction
4 has more, with indictment gives a lot more information,
5 the actual charge that they charge though, that follows
6 and tracks 641 exactly, when they are charging a copy,
7 they charge a copy. When they charge information, they
8 charge information.

9 So to answer the Court's question, if
10 you determine that they charge database. And when they
11 she said database in this case, it's important to look
12 at the actual specification. When they say, to wit the
13 combined information data network exchange Iraq
14 database containing more than 300,000 records, what
15 they are talking about is the database they do a
16 description of the database.

17 The way you would prove that under 641
18 is cost of production, the equipment and maintenance of
19 the database. So if someone actually stole the
20 database, that's how you would prove it.

21 So in the Defense's position, if the

1 Court determines to hold the feet of the Government to
2 its burden of what it proved or what it alleged I
3 should say, then in this instant the 917 should be
4 granted. It's clear the evidence came out that the
5 database was not tainted. Everyone realized that
6 besides the Government in how they charged it.

7 Now, if the Court says database, they
8 used the description of containing more than 380,000
9 records, then that encapsulate records. So you're on
10 notice of both database and records.

11 If the Court says that, again, in this
12 instance, the 917 should be granted. The reason why
13 is, we again had evidence the records were taken from
14 the Government.

15 The database and the records always
16 remained with the Government. We had multiple
17 witnesses say that at no time could they not access
18 CIDNE-I, CIDNE-A, those records all were maintained.
19 They were never taken from the Government's possession.
20 And so now what you have is, you have perhaps copies of
21 records and information. So the last two things.

1 Just looking at it in the abstract of
2 how you prove these things. All the 641 cases for
3 records, is cost of production of the original. So
4 that is the people who are working on it, typing into
5 it, how long it took to create the record.

6 THE COURT: What cases are you relying on
7 for that?

8 MR. COOMBS: Well, all the 641 cases, the
9 DiJulio, the Hubbard, Jeeter, Jordan and Morrison
10 cases. That line of cases, as well as Collins. Those
11 641 cases, when you read them, what you see is what the
12 Government charged and how you proved it.

13 And so, for example, I believe it is --
14 I think it's the Jordan case. There's an original so
15 they valued the cost of production of the original.

16 With regards to copying the records
17 mainly all these cases that I just cited for you, then
18 it's the cost of production of the copy. So their use
19 of the printer in the particular Government office, the
20 paper that was used to copy it, the time that was used
21 to copy it.

1 So the cost of production is how you
2 prove a copy of the records. Because that is what you
3 are valuing. You're valuing the copy of the record and
4 so how you do that, the cost of production of it.

5 THE COURT: Let me ask you a question.
6 Those copy cases, did each of them, did the Defendant
7 actually go back to the original records and make a
8 copy or did the person take the copy or steal a copy
9 that was already made?

10 MR. COOMBS: The Jordan -- the DiJulio is
11 a photocopy of the originals. So they took a photocopy
12 of the originals. Hubbard is copies of the originals.
13 The Jeeter case is carbon paper. So they took the
14 carbon paper, which arguably is the copy of the
15 original, and then returned the carbon paper.

16 So, when you look at all those lines of
17 cases the, in the allegation they actually charge what
18 was alleged to be taken, the copy. And then they value
19 that. And in those cases in which they charge
20 information, in addition to that, they, in fact, value
21 the information.

1 THE COURT: What would be the cases that
2 also charged information?

3 MR. COOMBS: Jeeter and Jordan. And
4 important for us is DiJulio. They charged photocopies.
5 If you look at Footnote 10 in DiJulio, it says they
6 obviously did not charge theft of information. If they
7 would have charged that, they would have relied upon
8 thing of value and stated the information.

9 So it's really easy, if we are going to
10 do a 101 of how the Government should have drafted this
11 offense, it would have been Pfc Manning did steal, to
12 wit: copies of 380,000 records from the CIDNE Iraq
13 database and the information contained therein. That
14 would have been a sufficient specification to allege
15 copies of records and information.

16 That's not what the Government did. And
17 when they failed to do that -- again, now they are
18 trying to at this 11th hour ask the Court to, not even
19 asking for a variance. They are saying, hey, we are
20 personally fine with the CIDNE-I, CIDNE-A database
21 containing more than a oven 80,00 records, even though

1 the records and the database have never been taken from
2 the Government's possession.

3 THE COURT: Does it have to be?

4 MR. COOMBS: Yes. If what you are --
5 charging him to take something. The reason why, that's
6 the second aspect of the slide. When you look at 641,
7 it's important not only to name the property but once
8 you do name the property, that shows how you prove
9 valuation of more than \$1,000.

10 And what the Government has done is
11 almost kind of a schizophrenic way of trying to prove
12 they charged database and records. They want to argue,
13 okay, we said that. We really meant copies of records
14 and information.

15 Well, even assuming the Court would go
16 down that line with them, they haven't proven the
17 value. So what they have done with copies of records,
18 they used the cost of the database.

19 THE COURT: Is there any case you are
20 aware that says they can't do that?

21 MR. COOMBS: Yeah. All the cases I just

1 outlined for the Court. Every one of these cases
2 indicate how you prove that value.

3 THE COURT: There's a variety of different
4 ways to prove value.

5 MR. COOMBS: There is, Your Honor, but the
6 cases indicate for copies of records. And if the Court
7 looks, you'll see, copies of records it is, all right,
8 the amount of time it took to print it, like per the
9 Collins case.

10 In that case they charged copies of
11 records and information. And in Collins the Court
12 said, look, we are going to void the information issue.
13 We are going to go with copies of records. Copy of
14 records the value, how we prove that was you, you used
15 the copier. So there's ink, toner and there's paper.
16 Your time, it's your time in copying that. That's how
17 they got to their value.

18 Value does matter and how you prove it.
19 Because when you take a look -- all the 641 cases,
20 every one of the cases of the copying. There are not
21 mixing and matching other things.

1 THE COURT: 641 cases involving the copy.
2 Do they say, all right, we got this case on appeal. We
3 can get to the, majority of those cases were before the
4 1,000 threshold. We can get to the \$100 threshold by
5 going down the copy theory, so we don't have to address
6 the rest of this, or do the cases say you can't value
7 it in any other way?

8 MR. COOMBS: In those cases they didn't
9 try to value it any other way. That's what the Defense
10 is trying to argue. Every one of those cases, when
11 they had a copy, they proved the value of the copy.
12 And it was through cost of production of copying. They
13 didn't attempt to prove it some other away.

14 And when you think about it just
15 intuitively, let's use just an outside example. I go
16 into Walmart and I steal a sweater from Walmart. And I
17 leave. I'm going to be charged with stealing a sweater
18 from Walmart and the value of the sweater.

19 Under the Government's theory you go
20 into Walmart and steal a sweater, they are going to
21 charge you with Walmart. And they are going to value

1 the bricks and mortar to build Walmart, the greeter
2 that meets you as you come in the door, how much they
3 get paid to greet people, the person who put that
4 sweater on the shelf. That's all this stuff. That's
5 all the value of the database.

6 THE COURT: Does it make any difference --
7 I'm looking at this, you have a database management
8 system. Database, records and information. Now in
9 this case I believe the allegations are that Pfc
10 Manning took entire databases and the records therein.

11 So, if that's the case, as opposed to
12 stealing the sweater, does it make a difference if you
13 steal everything in Walmart?

14 MR. COOMBS: It would. Let's say I'm
15 very, very good at what I do and I wait until they
16 close and I steal everything off the shelves to where
17 there's nothing left in Walmart.

18 You still cannot value Walmart, the
19 building, the mortar, the employees. That has nothing
20 to do with that. You still then say, okay, you stole a
21 million dollars worth of merchandise and that would be

1 how you would charge it.

2 And A really good case to view on that
3 is U.S. v. Gloria case, when we are talking about the
4 identity of the property. Both U.S. v. Gloria and U.S.
5 v Wilkins stand for both the identity of property and
6 the identity of who you escape from.

7 That idea is important because what you
8 charge is what you ultimately have to prove. So in
9 Gloria you have an individual who steals a debit card
10 and goes on a shopping spree. And he's charged with
11 stealing from USAA.

12 Everyone agrees, you know what, he
13 really -- he didn't steal from USAA, he stole from the
14 owner of the debit card.

15 So during the guilty plea they just
16 changed that. They don't do anything with the charge
17 sheet. They say, wait a second. You charged stealing
18 from USAA. So you need to prove stealing from USAA.

19 But more importantly for our case, ACCA
20 talks about a footnote that not only that, you charged
21 stealing more than \$500 -- money. We are not going to

1 put aside this issue because we are going to rule
2 against you on changing identity of the person, but you
3 didn't charge the right thing. He never took money.
4 He took merchandise. So you the debit card buy a whole
5 bunch of non-important items. That's what he actually
6 took. And so you even got the property wrong.

7 In the Wilkins case -- Wilkins case is
8 the wallet case. You have an idea of being charged
9 with taking \$75 of property and then they ultimately
10 prove they took the wallet. But he was charged with
11 the \$75.

12 THE COURT: Here you have a database
13 containing records. In that case, if you had a wallet
14 containing \$75, wouldn't you have the theft of \$75
15 still get the wallet, right?

16 MR. COOMBS: Perhaps. That's why, again,
17 in this case, if you thought the records was not
18 descriptive of the database, you might get to database
19 and records. But you certainly don't get to copies of
20 records and information. And the reason why you don't
21 get there is, when we --

1 THE COURT: Let's tailor our argument that
2 way. I can tell you pretty much that's the road I'm
3 going on.

4 MR. COOMBS: Yes. If you say, I think the
5 database that you allege and you say containing more
6 than 380,000 records, that wasn't descriptive that was
7 alleging both. So the Defense would take issue with
8 that.

9 THE COURT: I understand.

10 MR. COOMBS: Okay. When you come down to
11 what is important then for the 917, did he take the
12 database and did you value it? He didn't take the
13 database. We can scratch that out. If the Court were
14 going to be lining through something for findings,
15 let's say on this, you line through database. He
16 clearly didn't steal the database. The database was
17 never taken.

18 So now you are left with 380,000
19 records. Well, he didn't steal the records. He stole
20 copies. Because those records were never taken from
21 the Government's possession. So even if the Court gets

1 there, then what's the value of the records? Well,
2 they did do a, kind of, how much does a specialist get
3 paid and they worked on entering information in the
4 database.

5 They valued the record but not the copy
6 of the records. And the copy of the records would be
7 the cost of production. So if they actually charged
8 correctly, then they would have said, okay, the cost of
9 production.

10 So it would have been the CD that was
11 used to burn the records down on. The time that Pfc
12 Manning used in order to burn that CD. If that CD was
13 Government's property, it would have been the value of
14 the CD. That would have been the cost of records.

15 That probably, always definitely, would
16 not get you over the \$1,000. That would be why a good
17 prosecutor would say, you know I'm also going to charge
18 also any information contained therein. If you did
19 that, then you would have to do kind of a thieves
20 market for the value of the information.

21 But the problem with the Government's

1 theory is, they seem to think that, okay, we are going
2 to allege database and we are going to do that, kind of
3 the reason is, we know we spent millions, millions and
4 millions of dollars creating this database. And surely
5 we throw enough zeros at the Court, that's going to be
6 enough to get over the \$1,000 threshold. But they
7 ignore the fact that he never took the database.

8 So even if the Court were inclined to
9 say database and records, we still have a problem here,
10 he hasn't been charged with the right thing. The right
11 thing was copy of records and information. There's no
12 way that you extrapolate from database records to
13 copies of records and information.

14 And that is not only borne out in all
15 the 641 cases that clearly say when we do copies of
16 records, you allege them. And that's, again, Hubbard,
17 Jeeter, and DiJulio.

18 When you have information, you allege it
19 under a thing of value. And that is --

20 THE COURT: Let me ask you a question on
21 that. Can I have a record without information?

1 MR. COOMBS: You could.

2 THE COURT: How?

3 MR. COOMBS: A photograph. I believe
4 that's the DiJulio case. You have a photograph of
5 something. That's would not have information in it.
6 The one case in which he sold to James Wheatly --
7 actually it's not. I'm drawing a blank.

8 James Wheatly, a photograph. That was
9 charged as a record. They charged it not as a copy
10 because it was the original. The individual cut off
11 the secret, the border basically that had the
12 classification of the photo.

13 THE COURT: Morrison?

14 MR. COOMBS: All right. I will say, yes,
15 to that. Morrison.

16 So he cuts off the border. That's a
17 record. That would not have information, as we
18 understand the value of information. So that would be
19 an example of that. You could have 380,000
20 photographs.

21 The information, when you charge that,

1 that in all the 641 cases, Government supplement motion
2 and the cases we gave to the Court, if that were an
3 issue, then you would have an argument of can you
4 charge classified information, you would have an
5 argument of First Amendment and whatnot.

6 THE COURT: With classified information?

7 MR. COOMBS: Even with classified
8 information.

9 THE COURT: What would be your argument
10 with classified information?

11 MR. COOMBS: I would tell you that, if I
12 were going to make that one, that would have been made
13 along with all my other motions. I would have said
14 they charged information. I'm going to allege even
15 though there are circuits that say, yeah, information
16 falls under thing of value, that was Congress's intent,
17 there's contrary law.

18 THE COURT: By one circuit?

19 MR. COOMBS: Yes. I would argue that.
20 They didn't charge information. Even now, when you
21 take a look at the Government's motion and response

1 motion, they seem to bounce back and forth on all these
2 terms, as if sometimes they are alleging he took the
3 database and records and other times saying, well, it's
4 clear he took copies of records and information therein
5 and it's clear that he violated our exclusive
6 possession of that evidence. But none of that is
7 clear.

8 Even though we are in a notice pleading,
9 that is not the situation in this case where you
10 actually pled something and you own it. And what you
11 should own is what you pled. That's a database or at
12 most maybe database and the records. They haven't
13 proven that.

14 And, you know, when you take a look at
15 like the wallet example, again, let's take money out,
16 because money has an intrinsic value that you look and
17 see. Let's say he was charged with stealing a wallet
18 and five business cards.

19 And ultimately that's what we see,
20 trying to prove value. The way you prove the value for
21 the business cards would be charging the information.

1 Perhaps the actual -- if the business
2 cards, made out of gold or something, you could say
3 wow, this is a very expensive business card.

4 More than likely the business card would
5 be information. And then you would be valuing the
6 information. So you would be proving the five business
7 cards had a certain value. And the way you do that is
8 having somebody come in and say, look, the information
9 on this business card, when you put it collectively or
10 independently, has value.

11 THE COURT: So where I'm having trouble.
12 Taking that analogy and assuming the charge sheet would
13 have to read, stole a wallet, five business cards and
14 the information in the business cards?

15 MR. COOMBS: Right. When you take a look
16 at the 641 offenses, if you are charging for 641. If
17 you are charging under 121, you're saying what he stole
18 had a value of something. And, again, I guess you
19 would have to prove the value of the card. For a 641,
20 the way it lays out, record, money, voucher or thing of
21 value, you need to fit into one of those things. If

1 it's money, fine, you plead that. If it is record, you
2 plead that. Or copy of record. And the thing of value
3 is where you find the information.

4 So every case in which they charge
5 information, it was under a thing of value. Again, the
6 majority of the cases kind of avoid the concern on
7 information because the copy of the record could
8 independently get them to the 641 outcome they are
9 asking for.

10 So based upon the Government's
11 responses, they are not asking for any variance under
12 603. They are going straight with, we charged what we
13 charged and you were put on notice.

14 Again, go back to their Bill of
15 Particulars and back to their instructions, there's no
16 way that you could get copy of records and information
17 from the way they charged.

18 And because of that the Government
19 hasn't proven, even with all the evidence taking in
20 light most favorable to the Government and drawing all
21 reason inferences, you do not have a item that they

1 have alleged actually being taken. It's never been
2 taken. And then, obviously, what was taken they didn't
3 charge. And even what was taken they never valued.

4 So you have got multiple problems with
5 the Government's 641 charges incident.

6 So subject to your questions, Ma'am.

7 THE COURT: The chart you are using has
8 not been marked. We need to have it marked as an
9 Appellate exhibit.

10 One more question. Talks about the
11 Government requiring the need to prove substantial
12 interference with the Government's interest.

13 Now there's two different theories; you
14 have your theory of purloining, as well as your
15 knowingly converting. Does that element apply to both?

16 MR. COOMBS: I guess the Government's --
17 Government has gone back and forth on whether or not
18 purloining is one of the theories they are going. Even
19 if it is, it doesn't matter. Certainly every steal is
20 a conversion.

21 THE COURT: I think that's the other way

1 around.

2 MR. COOMBS: No. Every time you steal
3 something it would be conversion. A conversion would
4 not necessarily be a theft. And so in this instance
5 they would have to prove at least substantial
6 interference in order to meet either one of those.

7 So I guess the idea of taking the
8 property either permanently or temporarily would have
9 to be a substantial interference under the Defense's
10 position.

11 THE COURT: Thank you. You can have that
12 marked at recess, unless you have a copy to go.

13 Mr. Coombs, do you mind if we leave that
14 chart up during the Government's argument?

15 MR. COOMBS: Not at all, Your Honor.

16 THE COURT: Or least have it available to
17 be put up.

18 CAPTAIN von ELTEN: Ma'am, the charge
19 sheet alleges that databases contain records are
20 stolen. Also specifically adds a thing of value in the
21 charge sheet, which puts the accused on notice that

1 information would be at play.

2 THE COURT: How does that put him on
3 notice.

4 CAPTAIN von ELTEN: A thing of value as,
5 plainly means anything, broadly construed in the
6 definition set forth in the Government's brief about a
7 thing is anything property right or ownership.

8 THE COURT: If you put a thing of value,
9 that puts the Defense on notice of everything under the
10 sun?

11 CAPTAIN von ELTEN: Everything related to
12 the intrinsic quality of the charged property.

13 United States database collection of
14 records and compilation of information. That
15 definition is in accordance with Black's Law
16 Dictionary.

17 THE COURT: Are you asking me to take
18 judicial notice of the definition?

19 CAPTAIN von ELTEN: Yes, Ma'am.

20 THE COURT: Mr. Coombs, any objection?

21 MR. COOMBS: No objection.

1 THE COURT: Okay.

2 CAPTAIN von ELTEN: Database is important
3 it puts Defense on notice of many things; one, the
4 source of the information. It also gives the accused
5 notice that the database is electronic in nature.
6 That's important for Defense's arguments regarding
7 copies and originals, the difference between the two.

8 Also, the database gives notice by
9 charging the CIDNE database versus NCE database, gives
10 notice of the types of information at issue as it's
11 related inherent to the database in the records that
12 would be contained in there.

13 United States would direct the Court's
14 attention to United States v Patone where the Second
15 Circuit upheld a charge under different Section 2314
16 but charge where documents related to poachers and what
17 was actually stolen in that case were a photocopies
18 made not with Government property but made by the
19 defendants in that case themselves.

20 But the Second Circuit upheld that as
21 being documents.

1 THE COURT: What type of authority would a
2 case interpreting a different statute be with respect
3 to this statute?

4 CAPTAIN von ELTEN: It would be
5 persuasive, Ma'am. Electronic records are created by
6 downloading them to a computer. The charge sheet gives
7 notice of that.

8 THE COURT: How does it give notice of a
9 copy?

10 CAPTAIN von ELTEN: You access a record
11 from a database and pull it down, to sort of remove it
12 from the database is to create a copy by its very
13 nature. It coexists in multiple places simultaneously
14 because it's electronic.

15 The records remain at United States
16 Government all times. Ownership of the records is not
17 in dispute. Pfc Manning created the records that he
18 stole and converted with Government's property. Thus
19 they remained United States Government property at all
20 times.

21 THE COURT: Created the records, he stole

1 and he converted. What is the Government's theory or
2 theories of how this was accomplished?

3 CAPTAIN von ELTEN: Conversion, first way,
4 by taking records and exporting them to an unauthorized
5 party, WikiLeaks. The second would be depriving the
6 United States Government of the exclusive use of the
7 information.

8 THE COURT: That is your stealing theory,
9 your purloining.

10 CAPTAIN von ELTEN: Stealing, purloining
11 that would be to the first by taking United State's
12 property out of United States's possession into his
13 possession also furthermore by exporting those records
14 to an unauthorized party that also. Is just an
15 additional step.

16 THE COURT: So the giving, communicating
17 to unauthorized party, is that where the conversion
18 steps in or is the conversion from the beginning?

19 CAPTAIN von ELTEN: It's a conversion once
20 they are removed from the exclusive possession of the
21 United States Government. If it were a rifle, or taken

1 from personal residence, stolen and converted rifle at
2 that point. The conversion of the information occurs
3 when the information is disseminated beyond
4 unauthorized personnel.

5 THE COURT: The instruction I am going to
6 have say for conversion, the misuse was seriously and
7 substantially interfere with the United States
8 Government's property rights. How does it do that in
9 this case?

10 CAPTAIN von ELTEN: United States has a
11 long time interest and been exclusively in possession
12 of that information. Much information presented
13 discussing that. Once it leaves the possession of the
14 United States, United States rights and interest are
15 lessened, significantly decreased.

16 I would point the Court to Mr. Lewis'
17 testimony about that.

18 THE COURT: Okay.

19 CAPTAIN von ELTEN: Back to the point
20 about the electronic records. Defense talks about
21 DiJulio and other cases, Freedman, where photocopies or

1 carbon paper charge. But that's different because the
2 photocopy or carbon paper is something specifically
3 different. Here electronic records have been charged
4 and the evidence has been related directly to the
5 electronic records that were stolen.

6 Furthermore, Your Honor, the accused
7 himself referred to the databases -- the property he
8 stole converted as databases in his chats with Mr.
9 Lamo.

10 THE COURT: What difference does that
11 make?

12 CAPTAIN von ELTEN: It means he thought he
13 stole databases and records. Furthermore --

14 THE COURT: So if the charge sheet is
15 defective, the Government can say, well, the accused
16 knew, like in Wilkins, when the person escaped from the
17 custody, A, but charge sheet said B, the fact the
18 accused knew it was B and not A is enough to say the
19 specifications?

20 CAPTAIN von ELTEN: We are saying that we
21 charged A, and accused said it was A. In Wilkins it

1 was two totally different things. Wallet and money.
2 Here we are saying charge electronic records.

3 THE COURT: I'm talking the case with the
4 escape from custody Person A instead of Person B.

5 CAPTAIN von ELTEN: In that case United
6 States argument would be that, that's an ownership
7 issue and that would be source, database defined source
8 of it. Saying if we charged records from NCD and prove
9 records from other database, that argument would be
10 appropriate in those circumstances.

11 THE COURT: Even though the accused knew
12 they were from the other database?

13 CAPTAIN von ELTEN: In our cases we are
14 saying something else.

15 THE COURT: Well, let's just move along.

16 CAPTAIN von ELTEN: The accused also
17 described the search functionality.

18 THE COURT: I don't care what the case
19 described. Go ahead.

20 CAPTAIN von ELTEN: Information is related
21 to the charges in two ways; one, it's a thing of value

1 as charged; two, intrinsic quality.

2 Defense talked about a record photograph
3 not having information. United States would point the
4 Court to Seagraves, which has been referenced in many
5 641 cases. In that case maps were stolen and their
6 value exceeded authorized access \$5,000 based on the
7 information contained in the maps.

8 THE COURT: Is that case in the
9 Government's --

10 CAPTAIN von ELTEN: No, Ma'am.

11 THE COURT: Please provide it to me.

12 CAPTAIN von ELTEN: Yes man. So
13 information is intrinsic quality. Record in Lambert
14 the Court said that a man of common intelligence would
15 understand, 1979 electronic record necessarily includes
16 information. 1979 computers were much less than they
17 are today information should be understood.

18 Also information is intangible property
19 falls within the broad treatment 641 as addressed in
20 the briefs. 9th Circuit. 9th Circuit's understanding
21 of 641 and applying to tangible property totally meets

1 the Congressional and Supreme Court's interpretation.

2 THE COURT: Talking about Shappel case?

3 CAPTAIN von ELTEN: Yes, Ma'am. It is
4 discussed later in Tobias. In Tobias, first of all,
5 acknowledges the existence of what they call, what they
6 deem classified information exception. 9th circuit
7 says is not applicable in that case. It can be applied
8 just not in those circumstances.

9 THE COURT: Talk to me about the
10 classified information exception.

11 CAPTAIN von ELTEN: The 9th Circuit
12 doesn't expound on what the circumstances are. But
13 given their ruling in Schwartz, which conflicts with
14 their rulings in Tobias and Shappel.

15 THE COURT: Is that interpreting a
16 different statute?

17 CAPTAIN von ELTEN: Yes, Ma'am. It would
18 seem they are saying in certain circumstances, also
19 recognized Judge Winter, not define circumstances would
20 be, where information is at issue it can be subject to
21 641 as intangible property.

1 The second part is, 9th Circuit reaches
2 that determination by relying on common law
3 understanding of conversion. Which is wholly
4 inapplicable because Congress used words in drafting
5 641 not in the common law, steal and purloin.

6 9th Circuit says, we had a common law
7 restriction for one word. Congress, okay, we want to
8 fill the caps and crevices and have a broader reach in
9 a modern train of drafting laws. And then so use terms
10 not in the common law, without those restrictions. And
11 then the 9th Circuit in contravention of the Supreme
12 Court, we are going apply those restrictions any way.

13 They don't say a thing of value doesn't
14 by its plain text apply to intangible property.

15 THE COURT: Is there a distinction between
16 tangible property, when the Government charges tangible
17 property containing information and the Government just
18 charging information or intangible property without
19 tangible property going along with it?

20 Let me begin. What is the Government's
21 view on whether computerized records are tangible or

1 intangible property?

2 CAPTAIN von ELTEN: The United States view
3 is it's tangible property in accordance with the
4 Morrison case, I believe cited in the brief where talks
5 about electronic deposits that were reducible to
6 tangible form, that being money or treated as tangible
7 property.

8 THE COURT: So the information that you're
9 talking about -- two different scenarios where
10 information goes along with tangible property and a
11 potential wherein intangible property alone is charged,
12 somebody goes and memorizes something and -- a bank
13 card goes to bank and uses it.

14 CAPTAIN von ELTEN: Yes. Different types
15 of intangible property. Information is always
16 intangible property. So in that case the information
17 would always be intangible, but always intrinsic of
18 intangible piece of property.

19 THE COURT: Is that the Government
20 position is with respect to this case?

21 CAPTAIN von ELTEN: With respect to

1 valuation, information is intrinsic part of the
2 tangible document. With respect to conversion
3 information is intangible. Document themselves are
4 tangible.

5 THE COURT: What's the difference between
6 conversion and stealing for tangible and intangible
7 information?

8 CAPTAIN von ELTEN: Government's position
9 is, for stealing it doesn't matter because only
10 conversion has that common law restriction to tangible
11 goods, personal property, chattels, things of that
12 nature.

13 THE COURT: Okay.

14 CAPTAIN von ELTEN: Defense talked about
15 that these are copies of records and that the evidence
16 the United States offered doesn't support valuation,
17 but again these are electronic records. They could not
18 exist but for the databases and supporting
19 infrastructure.

20 THE COURT: Let's look at this valuation
21 piece here. Before you begin let's look at the top

1 part of the slide. Does the Government agree that
2 that's how you have to prove value for each of those
3 things?

4 CAPTAIN von ELTEN: No, Ma'am. The
5 position is that the record database are inherently
6 intertwined and thus cost of production equipment
7 maintenance goes to that. Furthermore, copies of
8 records in terms of valuation is not meaningful
9 distinction. Those copies are still United States
10 records. They could not exist but for the database.

11 So under Defense's term we would say
12 that cost of production equipment and maintenance goes
13 to copies. Those are still records.

14 For information, the evidence has shown
15 that a lot of this infrastructure is put in place to
16 make that, because the information, cost of production
17 equipment and maintenance would go to information as
18 well.

19 THE COURT: Is it the Government's
20 position, same question I asked the Defense, using the
21 Walmart analogy, does it matter if you steal a copy of

1 a record or the entire database?

2 CAPTAIN von ELTEN: Yes, Ma'am. Walmart
3 analogy one thing, we are taking the entire contents of
4 a store, that whole infrastructure is there to support
5 that. Walmart would recognize all that as part of
6 selling the goods would be depreciating the building,
7 all those other things.

8 So the Government's position would be,
9 yes, relevant if you stole the entire contents of
10 Walmart.

11 THE COURT: Assume for the sake of
12 argument that Pfc Manning -- well, let's take a real
13 example that could be possibility in this case. Assume
14 that there were, I believe, 74,000 records in the GAL.
15 Assume that's what was proved stolen.

16 Would the cost of the entire maintenance
17 of the database system be something that the Government
18 could use to value that?

19 CAPTAIN von ELTEN: Yes, Ma'am. For the
20 GAL, for the GAL, the Chief Nixon testified the way the
21 GAL is created and distributed, it's done organization

1 levels. So at core they maintain the core level and
2 then the way the core maintains it, it gets information
3 pushed up from divisions, collects it, pushes it back
4 down to the division level. The same thing happens at
5 the division level to and from brigade, back and forth.

6 Chief Nixon's testimony was that at the
7 division level GAL, that's what it looked like to him.
8 In this case the cost of production of that portion,
9 all that -- but for those pieces of equipment there
10 could be no GAL. There would be no functionality.

11 THE COURT: Okay. For the GAL, if part is
12 stolen, the cost of production that part of the GAL is
13 what the Government believes could be used for value,
14 not the whole GAL?

15 CAPTAIN von ELTEN: Yes, Ma'am.

16 THE COURT: Okay. My next question, if
17 one address was stolen, could the entire production of
18 the GAL be used to establish value?

19 CAPTAIN von ELTEN: Prorated share. Very
20 small prorated share.

21 Support cost, addressed by case law.

1 United States was not limited evidence gasoline. Also
2 able to use things that were intrinsic and apparent to
3 actually create the flight time; namely, they relied on
4 pilot salaries, mechanics' salaries, even though not
5 actually involved during the actual flights.

6 Similarly, the Court noticed personnel
7 costs were appropriate. Transportation costs, which
8 further left open the broad other actual cost. United
9 States position these are actual cost to creating and
10 maintaining these databases records but for this
11 infrastructure the records could not exist and could
12 not be used as they are designed. Which also goes to
13 the information.

14 THE COURT: Do you have any case law
15 supporting this basically value of the database
16 management system and input to value theft of a copy
17 record, if you would?

18 CAPTAIN von ELTEN: Say the question again
19 please.

20 THE COURT: Any case law, when you go into
21 a database, you take the records, United States still

1 has the records, that you can use the cost of producing
2 the original records as a value system?

3 CAPTAIN von ELTEN: So the United States'
4 position on that is, this is an example of making a
5 photocopy. In that case the machinery used to create
6 that record, the photocopy, is what is relevant.

7 Here the infrastructure supports the
8 record that was made all the computer involved with it.

9 THE COURT: Is there any case that has
10 specifically held that?

11 CAPTAIN von ELTEN: United States has not
12 been able to find any cases that discusses valuation
13 for electronic infrastructure.

14 Subject to your questions.

15 THE COURT: Well, I'm still back to your
16 argument that you can use the valuation of the whole
17 database management system. If you took one SigAct,
18 that record wouldn't exist either, if you didn't have
19 the entire database management system. So do you get
20 the value of the entire database management system for
21 the one record?

1 CAPTAIN von ELTEN: Ma'am, those are
2 actual costs of producing the document. That would be
3 left up to the fact finder to determine whether that
4 was fair evaluation. It would be evidence of the cost
5 of the documents production.

6 THE COURT: Does the Government see a
7 distinction between electronic records and hard copy
8 records? The same argument could be made when you are
9 stealing a copy of the FBI manual, that the cost of
10 going into producing the original manual would be,
11 could be used for evaluation. Would that be
12 Government's position?

13 I believe that's the DiJulio case. That
14 was an actual photocopy. The Court said we are going
15 to go ahead and use the copy and not get into the
16 information.

17 CAPTAIN von ELTEN: If the original
18 machinery that had been used to produce that original
19 document, had been used to produce the copy, then, yes.

20 THE COURT: To value the copy would you be
21 able to use the production hours -- somebody steals a

1 copy of Army Regulation 27-10. Do you use the cost of
2 the man-hours that it took for all reviews, all
3 provisions, all changes and all of that to actually
4 produce AR27-10, all the salaries of the JAG officers
5 that went into the 27-10 to value the copy of AR27-10
6 stolen?

7 CAPTAIN von ELTEN: I think that's a fair
8 reading of the case law, Ma'am.

9 THE COURT: And the case law you are
10 relying on is?

11 CAPTAIN von ELTEN: Selog May.

12 THE COURT: Defense.

13 MR. COOMBS: Your Honor. So just carrying
14 on with what you ended up on the Government. We would
15 look to United States v. Jordan as a good case for the
16 Court to look at.

17 In that case you are dealing with theft
18 of NCIC records. The Government there did not charge
19 the database, like you stole NCIC database. They
20 charged theft copy of the records. So when you look at
21 the charge sheet --

1 THE COURT: Did they steal a certain
2 amount of NCIC records or all?

3 MR. COOMBS: Certain amount. It lays out
4 the actual charge. For copies -- what they did, they
5 printed out copies of NCIC records that were for
6 individuals who had ongoing cases.

7 And so they wanted to basically give
8 them that information for the benefit of, I guess,
9 their defense.

10 So when they charged copies, they
11 charged as containing printouts of criminal records of
12 absentee voters and then delivered the printouts and as
13 property of United States had a value in excess of
14 \$1,000.

15 So they charged it as printouts
16 specifically. When they charged information, they
17 charged a thing of value of United States that is
18 information contained in the NCIC records.

19 And actually the Jordan facts are, it
20 was for a printouts of absentee voters. So it actually
21 was contesting an election. But when you look at that

1 the way you charge it, Jordan clearly indicates there's
2 a difference between the actual record and a copy of
3 the record and information that's in the record.

4 The Government says a database is
5 electronic and so it exists as it does and a copy
6 doesn't make any difference. You could have like my
7 computer, I have got a copy of a motion. Someone could
8 go on my computer and take it, actually take that off
9 of my computer to where I no longer have access to it.
10 That would be taking of the record, what the Government
11 actually charged.

12 THE COURT: How would you possibly take
13 the Government's database unless you went into all the
14 servers and -- how would you do that?

15 MR. COOMBS: That's the problem the
16 Government charging. If they were charging records,
17 like he stole the records, you could go onto the
18 database, download all the information, delete the
19 information to where you have taken it now. So now
20 someone goes to the database and there's nothing there.

21 And you see that oftentimes in cases

1 where somebody has broken into somebody's computer,
2 stole all the information and then basically deleted
3 their computer to where now they go into their computer
4 it's not there. They clearly stolen the actual records
5 in that instance. So the individual can't access it
6 anymore.

7 We look at some of the 641 cases, when
8 they are talking about whether or not the Government
9 has been deprived of anything -- look, the Government
10 never lost the actual records.

11 In all those cases say, well, yes, but
12 you were charged with a copy of the record. When you
13 made a copy of the record, you know, that is what is
14 being said is the Government's record. What you made,
15 a copy of the record.

16 So that was taken. That's what we are
17 valuing. And so in this instance you need to value
18 what it is. That's the copy of the record. When the
19 Government says, you can consider the cost of
20 production of the database, as the Court says, if
21 SigAct, how far back do you go or 27-10 manual or AR

1 regulation, what do you consider.

2 And if you just took the 27-10 and
3 considered all the hours of manpower, the Government
4 would say, yes. And clearly case law doesn't support
5 that. In every one of the cases when, it's a copy they
6 value the copy. It's usually the cost of production of
7 the copy.

8 THE COURT: Is the Defense aware of any
9 case involving theft of an entire database or entire
10 electronic record?

11 MR. COOMBS: Again, I guess here, when you
12 say the entire database, it wasn't the entire database.
13 Even at the time he took it, it wasn't the entire
14 database. Because the SigAct database, the GAL
15 database, I guess maybe the South Com database you
16 might be able to say that was all the records within
17 the database. That wasn't updated.

18 THE COURT: Let's talk about CIDNE-I and
19 CIDNE-A.

20 MR. COOMBS: Everyday that database
21 changes. Additional information gets put on there.

1 The government offered information to try to narrow
2 time when he took it because they said he didn't. We
3 did, screen shots, forensic research of the last SigAct
4 that is in the information charged or the copies of
5 records charged with the time on the actual database of
6 when the next SigAct was put there.

7 So we can narrow down time the time
8 group of when he must have taken the copy of the
9 records. Because it no longer, it doesn't have this
10 additional SigAct that fell in a minute later or
11 whatnot.

12 And so that database is constantly
13 growing. He didn't steal the database, obviously. He
14 took copies of the records within the database at a
15 particular time. Same thing with the GAL or both
16 CIDNE-I and CIDNE-A database would be identical.

17 THE COURT: Time he allegedly went in
18 there and took it, that was the scope of the database
19 at that time?

20 MR. COOMBS: I don't know if you can say
21 that because the -- he took it up to December 31st and

1 he took it in January. So there were records that were
2 put in there between the time they took it.

3 And the reason why that's a cutoff, the
4 evidence shows you can export SigActs by months from
5 EL. He exported up to December 31st. So it wasn't
6 even at the time the entire database. And the same
7 thing with, you know, talk about GAL, in fact, I'll
8 just transfer to the GAL argument.

9 Same thing would be true with the GAL of
10 undoubtedly every day there are email addresses both
11 being added and taken off, if it was, in fact, what the
12 Government alleges.

13 The Government says that they cited the
14 one case that a map had information and, therefore, you
15 know, that shows you that -- map and photo is kind of
16 apples and oranges. A map has a lot more data in it,
17 just looking at it than a photo does.

18 THE COURT: Well, following a sensitive
19 area that nobody has seen. Would that be information
20 that would be valuable?

21 MR. COOMBS: Potentially. If it did, then

1 you would see, as in all the cases that did charge
2 information, you would see a charge of that
3 information. As a thing of value.

4 THE COURT: Which cases should I be
5 looking at?

6 MR. COOMBS: The Court should be looking
7 specifically at Jeeter, Jordan and Hubbard for copying
8 information. And the Court should also look, just as
9 persuasive authority on this issue DiJulio. In DiJulio
10 they charged copies. And the Court indicated there
11 that obviously they did not charge theft of information
12 because they would have charged that information under
13 a thing of value.

14 And the Government gets up and says,
15 well, you know what, we included those magic words. We
16 included thing of value. And from that you should have
17 interpreted what we meant was information.

18 But that's not the case because under
19 Defense's view, when they charge database, that is the
20 thing of value they were alleging. In fact, it was.
21 When you look at the thing of value, what follows

1 immediately thereafter the to wit is what they named.
2 And that is the database.

3 THE COURT: They say a record or thing of
4 value. So Defense's position that means database.

5 MR. COOMBS: Right. That's all that's in
6 the specification. And when you think about it for a
7 moment, if that really was the Government's position
8 and so many times the Government gets off and says no
9 case law that supports what we are saying, no one has
10 considered this before.

11 This is yet another example of that.
12 But this is Trial Counsel 101, when you draft the
13 charge sheet and you lay out the elements, you charge
14 what you intend to prove.

15 How far would it have been then, if we
16 have taken at face value, thing of value, when they are
17 looked at it, they interpreted that to mean
18 information. It would have been so easy, especially
19 copying the examples of 641 cases then, to lay out
20 copies of records from the CIDNE-A database and the
21 information contained therein. That would be notice

1 pleading. That would be pleading the information, the
2 thing of value.

3 THE COURT: What is your position with
4 respect to the Government's position that basically
5 information is inherent in a record.

6 MR. COOMBS: It's not. I guess --

7 THE COURT: Or a photo.

8 MR. COOMBS: It's not inherent for sure.
9 But the key thing is, we are dealing with 641. So when
10 you incorporate 641 under 134 you take with it the case
11 law. If that were the case, if information were
12 inherent, the Government's position were correct that,
13 you know, it's the Defense that is just, is clueless
14 and not understanding the specification, you wouldn't
15 have all these cases that lay out the difference
16 between copies and information. You wouldn't have
17 DiJulio saying obviously the Government didn't charge
18 information, because they need allege it.

19 You wouldn't have this issue of does
20 information fall under 641? Because there would be no
21 dispute, if that were the idea that's inherent in the

1 record. People would see clearly records fall under
2 641. It's named 641. So there's no dispute. You
3 wouldn't even be arguing the issue of information. But
4 you do. And we have. And it's clear when you look at
5 case law there is a difference.

6 So looking at the GAL. The GAL is
7 identical, as far as the argument, because the
8 Government charged the USFI GAL. That's what they
9 specifically charged.

10 And they failed, first of all, he did
11 steal the USFI GAL. That's how they actually pled, the
12 USFI GAL. And they went about trying to prove it in
13 that manner too, the cost of GAL. But that GAL has
14 never taken from the Government's possession.

15 At best you have .mil addresses that
16 were taken. But they didn't deduce any evidence to
17 suggest that .mil addresses that were found on Pfc
18 Manning's computer were, in fact, the USFI GAL. The
19 Government witness Chief Nixon testified on two
20 different occasions.

21 The first time he testified he said that

1 the USFI GAL contained 160,000 email addresses. And we
2 know they were never on Pfc Manning's personal
3 computer.

4 Then the second time he testified he
5 said that he viewed the .mil addresses and he did not
6 believe that it was the USFI GAL. That, if anything,
7 it might have been division GAL. That was his
8 testimony.

9 THE COURT: Would that be a lesser
10 included offense?

11 MR. COOMBS: Well, the question then would
12 be, that would be appropriate, if we could show the
13 division GAL would be fall under the USFI GAL.

14 THE COURT: Was there testimony to that
15 effect?

16 CAPTAIN von ELTEN: I don't believe so,
17 Ma'am. I believe what he said was, each echelon had
18 its own GAL, for lack of better word I guess and the
19 division GAL didn't necessarily fall under USFI GAL.
20 It could. There is no evidence to suggest that it did.

21 THE COURT: I thought the evidence was it

1 went from the bottom up.

2 MR. COOMBS: Each person -- might have
3 brigade, might have a division, you might have a, in
4 this case, USFI. But there is no evidence that the
5 USFI GAL incorporated all of everything beneath it.

6 All that's been testified to is that
7 there's a difference between these things and one of
8 the things is the division GAL.

9 And so now you have an identity of
10 property issue. And this goes to the Wilkins case,
11 Marshal case. It's important what you plead. You pled
12 the USFI GAL so you need to prove the USFI GAL. And
13 they haven't done that. They haven't done that not
14 only from the standpoint of taking but they haven't
15 done that from the standpoint of value.

16 And the reason why I wanted to address
17 the GAL separately is, entertaining the Government's
18 argument, let's say the division GAL is really what
19 they should have pled. Or maybe they are going to
20 argue -- no, no, it's a part of the USFI GAL. It's not
21 the entire USFI GAL, but it's a part. And that's what

1 we were pleading.

2 Well, we have had no evidence that the
3 taking was wrongful. Absolutely no evidence. In fact,
4 every bit of evidence has been to the contrary. The
5 testimony from Rearrd testified that there was no rules
6 or regulations stating that soldiers were not permitted
7 access or to download .mil addresses from the GAL.

8 Similarly, Chief Lowanex testified that
9 there was no prohibition against downloading .mil
10 addresses from any GAL. And the stipulation of
11 expected testimony from Special Agent Williamson stated
12 that DoD warning banner and legal notice did not
13 explicitly prohibit the downloading of email addresses.
14 I am unaware of any restriction or guidance that
15 precludes one from downloading emails addresses from
16 Outlook.

17 So even viewing in the light most
18 favorable to the Government, and all reasonable
19 inferences, they haven't proven that the taking, if
20 there was a taking, was, in fact, wrongful. We gave
21 the example of this would be no different than as a

1 Judge Advocate, if I decided I can go on archive global
2 list, I can prove every email address for every Judge
3 Advocate, and maybe I want to do that, and maybe want
4 to put it on my computer. Have I then committed a
5 wrongful taking or a larceny or a 641, if I do that.

6 THE COURT: What is the Defense's
7 position, there's also been testimony and evidence that
8 this came at the end in May of 2010. So there's been
9 evidence of a pattern of taking things from the
10 Government computers and sending them to WikiLeaks
11 among the way, along with a tweet.

12 So you have all this happening at the
13 end, could create an influence of wrongfulness. Now
14 the fact that these addresses are on his computer,
15 assuming that that is the case, what is the Defense's
16 on whether a larceny has been proven or anything else?

17 MR. COOMBS: I think it goes back to -- I
18 believe it was Rearrrd, or might have been Nixon that
19 said, well, no prohibition on downloading emails
20 addresses. You could do it. Not a problem. But I
21 guess it was a matter of your intent. One of them said

1 it would matter on the intent. So I guess in his mind
2 at least, if you had a bad intent, maybe that would be
3 wrongful. If you just wanted information, it wouldn't
4 necessarily be wrongful.

5 And so let's look at the evidence that
6 we have. Members offered this tweet saying was many
7 .mil addresses. Well, the .mil addresses that once Pfc
8 Manning did his research on the GAL, and see if he
9 could export some of the email addresses, what we have
10 information on those, those emails addresses were left
11 on this hybrid computer and there were email addresses
12 of the unallocated space of Pfc Manning's personal
13 computer.

14 His personal computer was not wiped or
15 cleaned or anything at all at that point. The forensic
16 evidence showed no attempt to transfer that to anyone,
17 give it to anyone. No evidence there has been any sort
18 of unlawful transfer of that to a person not entitled
19 to receive it.

20 And so the mere possession of it, much
21 like with me, if I wanted to pull down .mil addresses

1 for Judge Advocates in of itself, is not wrongful. It
2 would become wrongful, if at all, if you could show an
3 unlawful transfer of it. And the government has not
4 done that. No evidence regarding that.

5 So the Defense's position would be that
6 even looking at the evidence related to the tweet and
7 the research, if you're going to do as inference,
8 another inference just as likely based upon looking at
9 it, is you got a guy who everyone has testified is very
10 computer knowledgeable, probably the most knowledgeable
11 person on computer they have ever seen.

12 And he's now removed from his job and
13 the T-SCIF where every day he was doing so as part of
14 his job as an analyst and he's in a supply room.

15 And the testimony was he's in this
16 supply room not really doing anything. So you have got
17 a person there who researches can I do something. And
18 then what evidence do we have -- he does it so he can
19 show that he can do it, save it on the supply room
20 computer, has it on his personal computer but then it's
21 deleted.

1 And you can guarantee that the
2 Government search that computer, and again it was not
3 wiped. The Government searched that computer. If
4 there was an actual, any evidence to show that it was
5 transferred.

6 They have evidence of transfers for
7 everything else with the exception of things that
8 occurred prior to the time that one thing, the video
9 they are alleging occurred in 2009, you would see that.

10 So absent some evidence to show that Pfc
11 Manning did something with that that would qualify as
12 wrongful, then really all we have is Government's own
13 witnesses saying that there's nothing wrong with
14 downloading and saving this information.

15 THE COURT: Do you have an attempt?

16 MR. COOMBS: There again, I think you
17 would have to have some evidence to show the intent to
18 give this to somebody in order for it to be wrongful
19 again.

20 And there I guess the wrongfulness of
21 this would be, if we said that because of this property

1 and you have it, you can't share it with anyone else.
2 Government hasn't offered anything except one witness
3 who said, you know what, in my mind, nothing wrongful
4 with having it. But if you have a bad intent, maybe
5 that would be wrongful. That's the extent of the
6 evidence --

7 THE COURT: Well, you have regulations
8 that have been judicially noticed as well.

9 MR. COOMBS: Right. In those regulations
10 there's nothing in there that talks about transferring
11 .mil addresses. The Government's position on this, is
12 that it becomes wrongful and they tried initially to
13 say because it was not for value. That goes to the
14 next problem, evaluation.

15 There has been no evidence to,
16 legitimate evidence to value what actually was
17 allegedly taken in this case. That would be the copy
18 of the .mil addresses.

19 Again, the Government goes back to
20 database. They want to somehow bootstrap in the
21 overall value of creating the GAL. And then say, well,

1 these are .mil addresses within there, so we can
2 extrapolate from the million of dollars spent on
3 servers, virtual servers, man-hours and whatnot that
4 somehow these .mil addresses must have a value more
5 than a thousand.

6 This is lot like the Wilson case where
7 there's been no real evidence on the value. And you
8 have 100 rifles and they only need to be worth a \$1.39
9 a piece in order to get over the \$100 threshold, and
10 yet the Government hasn't offered any evidence.

11 THE COURT: What about Mr. Lewis'
12 testimony?

13 MR. COOMBS: Mr. Lewis' testimony, the
14 Defense's position on Mr. Lewis' testimony is that I
15 know for the 917 you don't judge the credibility
16 issues. But Mr. Lewis' testimony on the value of the
17 information would be in the Defense's position much
18 like U.S. v Horning.

19 THE COURT: Has that case been cited in
20 your brief?

21 MR. COOMBS: It has, Your Honor. There

1 the Government brought a person that had a book on
2 tools. It was basically a value of tools. They tried
3 to prove it both how the pawn shop would give a certain
4 amount of money for the tools and then also on the
5 person coming in and testifying from a Government book
6 as to the cost of particular tools.

7 And in Horning there was a motion to
8 strike that testimony because the person was not a
9 valuation expert, was not somebody who could ascribe
10 appropriate value.

11 And, again, for the 917 purposes we did
12 make a motion to strike. We renew that for the 917
13 purposes and would say that Mr. Lewis himself did not
14 consider himself an valuation expert. It wasn't until
15 a week before that he even knew what he was testifying
16 about.

17 So from the Defense's position there's
18 been no evidence on valuation of what was taken. And
19 that would be, again, a copy of the email addresses.
20 So the cost of production would be the value there.

21 The fees market that Mr. Lewis gave some

1 evidence on, that would be if there was evidence --
2 that being given to somebody. And then you would have
3 both maybe the wrongful and then you could say, okay,
4 well, that was given to somebody and let's prove the
5 value of it.

6 What Mr. Lewis didn't talk about, but
7 what is clear, these email addresses are at best last a
8 year. We heard from Nixon that, as soon as soon
9 somebody leaves, they pull those email addresses off.
10 So the .mil addresses that the tweet would be asking
11 for, if there was some sort of need for this for spam
12 or for some other unlawful purpose, you wouldn't be
13 asking for .mil addresses that are going to expire
14 within a year for sure. And more than likely the
15 majority of the emails addresses expiring much sooner
16 than that because of how people come in and out of
17 theater.

18 When the Court is looking for evidence
19 of maybe intent to take, well, the .mil addresses, if
20 you really wanted to take .mil addresses that were of
21 any value, he would go toward the U.S. Army .mil

1 addresses. He wouldn't go towards just the deployed
2 addresses.

3 THE COURT: Tweet wanted the GAL. The
4 .mil addresses.

5 MR. COOMBS: Yes, Your Honor. So you
6 would go towards .mil addresses that actually have some
7 value. Because all of these emails addresses will
8 expire within a year, for sure. And many of them much
9 sooner than that, because of when the people come in.

10 So even looking at the valuation Mr.
11 Lewis did not value email addresses that expire within
12 a year, the deployed email addresses. And so the
13 Defense's position is, not only have they charged the
14 wrong thing, not only have they failed to prove it was
15 wrongful, but they have also not proven valuation.

16 So subject to your questions, ma'am.

17 THE COURT: I think I have asked them.
18 Thank you. So what are they have not proved --

19 MR. COOMBS: So they haven't proved that
20 the right thing. They charged USFI GAL. And, if
21 anything, we have testimony it's the division GAL.

1 There's no testimony to suggest the division GAL was
2 part of the USFI GAL.

3 Then they have not proven the actual
4 wrongfulness, if there is, you know, from the
5 standpoint of taking it, if he did, in fact, take the
6 division GAL or portion of the USFI GAL. They haven't
7 proven that was wrong. All their evidence is to the
8 contrary. And then finally they haven't proven value
9 of the item that was actually taken.

10 THE COURT: All right. Thank you.

11 CAPTAIN von ELTEN: Let me begin by
12 answering the question you asked me last. United
13 States differentiates between publications made for
14 public consumption and publications made for the
15 exclusive use of United States Government and offer in
16 those cases it's more appropriate to include all the
17 cost of productions where something is made pretty
18 exclusive use for the United States Government.

19 THE COURT: Why?

20 CAPTAIN von ELTEN: Because if it's
21 photocopying, all the equipment that goes, like sole

1 purpose of creating that copy is just to -- just to
2 disseminate it. But in this case where information is
3 created exclusive for United States Government, all the
4 work that goes into it also goes into containing it and
5 to limiting the scope of people who have access to it.

6 THE COURT: Wouldn't be true in the NCIC
7 case too that was talked about?

8 CAPTAIN von ELTEN: Which case?

9 THE COURT: NCIC case for the voter fraud.
10 I don't remember the name of the case.

11 CAPTAIN von ELTEN: I'll have to go back
12 to you on the case.

13 THE COURT: The accused converted the NCIC
14 records to his own use. So you are saying anytime the
15 Government creates information for itself, you value
16 the entire system that creates it?

17 CAPTAIN von ELTEN: I'm saying there's
18 some evidence of it.

19 THE COURT: What is your authority to do
20 that?

21 CAPTAIN von ELTEN: For the exclusive use?

1 THE COURT: No. For the cost of
2 production equipment and maintenance of records in a
3 database. Any other case law use that valuation?

4 CAPTAIN von ELTEN: Not other than has
5 been cited before the Court. Again, the distinction
6 these aren't copies, these are records created from
7 those systems. Systems that create the record that go
8 to its valuation. If a photocopy is made, the
9 photocopy machine, electronic record the infrastructure
10 supporting them.

11 THE COURT: Well, talk to me about, is
12 there any authority that digital copies are not copies
13 of records?

14 CAPTAIN von ELTEN: United States would
15 have to conduct additional research into that. I have
16 only --

17 THE COURT: What is the United States
18 position with respect to the Defense's position that
19 every case that has charged violation of copies has
20 said copies.

21 CAPTAIN von ELTEN: First, it charged

1 documents when they were copies. That's not an
2 accurate reflection. Second, the United States
3 position is that a lot of those cases --

4 THE COURT: What does it charge.

5 CAPTAIN von ELTEN: Documents related
6 cultures.

7 THE COURT: The copies were --

8 CAPTAIN von ELTEN: Unlike in this case,
9 copies were created by defendants using their own
10 property. Defendants own photocopy machine.

11 THE COURT: So the Government's position
12 is that the copying is method of stealing.

13 CAPTAIN von ELTEN: It's part of the
14 transaction. By copying the records, by creating the
15 records --

16 THE COURT: Defense's position is the
17 original records never moved. So a copy was created.
18 What is the Government's response to it?

19 CAPTAIN von ELTEN: Copy is created using
20 this infrastructure and then that copy was stolen.
21 That copy is the United States record. That record was

1 created with all the computer infrastructure supporting
2 the database. And but for all that infrastructure the
3 copy couldn't be created. The infrastructure becomes a
4 photocopy machine.

5 THE COURT: You're looking at the
6 structure of your charge that they steal, purloin or
7 knowingly convert to use or use of another a record or
8 thing of value of the United States to a department or
9 agency thereof, to wit, Specification 4, the combined
10 information data network exchange Iraq database
11 containing more than 380,000 records.

12 Defense's position is, hey, he took a
13 copy of it. He never took the original.

14 CAPTAIN von ELTEN: United States position
15 is, that could also be read to say that there are
16 380,000 records from the CIDNE database.

17 THE COURT: And they all remained in the
18 CIDNE database after --

19 CAPTAIN von ELTEN: Not the copies that
20 were subordinate though, Ma'am.

21 THE COURT: That was my point. Does

1 the -- Defense is saying you didn't charge copies. You
2 charged originals. What's the Government's position?

3 CAPTAIN von ELTEN: Because they are
4 electronic, the distinction is rather fine.

5 THE COURT: Why?

6 CAPTAIN von ELTEN: They can go in
7 different places simultaneously because it's
8 electronic. It's not a paper document that can only
9 exist at one time until it is created. Because it's
10 digital that it's a different, paper cases are
11 different.

12 That goes to Defense's use of DiJulio,
13 and the other cases where they talk about, Freedman
14 where they took about photocopies. Again, those are
15 things that exist in one place at one time. And they
16 charge carbon paper because that was the method of
17 transmission.

18 The carbon, Freedman the defendants took
19 carbon paper and created grand jury transcripts from
20 those. That was ultimately what was converted was the
21 contents of the grand jury transcripts. The source was

1 the carbon paper. By carbon paper they provided those
2 to the source and method of transmission. Which is the
3 same as in this case.

4 THE COURT: What case is that?

5 CAPTAIN von ELTEN: Freedman. 9th Circuit
6 case, Ma'am. I can get you a copy.

7 THE COURT: I have it. Is there any other
8 case law that makes this distinction between digital
9 copy and hard copy?

10 CAPTAIN von ELTEN: No, Ma'am.

11 THE COURT: Why is the charge as is
12 sufficiently, legally sufficient.

13 CAPTAIN von ELTEN: Charge is sufficient
14 because it puts the accused on notice exactly what
15 property was taken, source of it and how it was taken
16 because of the electronic nature.

17 THE COURT: What's the Government's
18 position, is it required when someone steals knowingly
19 converts that the United States has lost use and
20 benefit of the property?

21 CAPTAIN von ELTEN: No, Ma'am.

1 THE COURT: For both a theft and stealing
2 and a conversion or is the standard different?

3 CAPTAIN von ELTEN: Is the standard
4 different for charging decisions, Ma'am?

5 THE COURT: No. For proof.

6 CAPTAIN von ELTEN: Proof is different for
7 conversion. Where evidence of a theft occurs that also
8 is evidence of conversion. Where the issue is being
9 charged for substantial interference the notice of the
10 property, the property rights interfered with, the
11 property itself has to be identified, the specific
12 rights do not need to be enunciated in the charge
13 sheet.

14 THE COURT: The Government does agree with
15 the Court's instruction that for conversion the misuse
16 must seriously and substantially interfere with U.S.
17 Government's property rights?

18 CAPTAIN von ELTEN: Yes, Ma'am.
19 Furthermore, for valuation purposes the Hood case,
20 electronic property at issue, although electronics,
21 TV's and whatnot, were inherent quality were use for

1 valuation there would be most analogous to this case
2 and the market valuation of them.

3 The Defense talked a little bit about
4 the GAL. I would like to clarify a few things.
5 Special Agent Johnson testified that excerpts of
6 thousands of emails were located on Pfc Manning's
7 personal computer. And that personal computer is
8 evidence of transfer. That transfer was from the
9 exclusive possession of United States Government
10 outside of that to Pfc Manning's personal possession.
11 At that point given that transfer the theft is
12 complete.

13 THE COURT: Whoa. I hear you with the
14 classified information. The GAL is not classified.
15 The evidence has shown, the testimony we have is there
16 is no prohibition on downloading the GAL to your
17 personal computer or anything else. So why is the
18 theft complete if it's on his computer?

19 CAPTAIN von ELTEN: Chief Nixon talked
20 about, testified about the access the user had. He
21 differentiated between visibility and access. he said

1 users had visibility.

2 He testified visibility meant that you
3 could go onto your computer and you could populate, you
4 could see it. Also testified you didn't have access to
5 export that information. You didn't have the ability
6 to take it and take it for your personal use.

7 He also testified --

8 THE COURT: You mean as a matter of policy
9 or as a matter of ability?

10 CAPTAIN von ELTEN: As a matter of
11 ability.

12 THE COURT: Nixon's testimony was you have
13 to do so manipulation of computer to do this.

14 CAPTAIN von ELTEN: The evidence supports
15 that as well. Pfc Manning conducted research on how to
16 defeat these mechanisms so that he could, as he put it,
17 ex-filtrate the GAL.

18 THE COURT: Chief Nixon says that you
19 can't download .mil addresses?

20 CAPTAIN von ELTEN: Yes. He talks about
21 the different between access and visibility. A user

1 has visibility. User can't go onto a computer and see
2 a list as it gets populated by the various mechanisms
3 from that organization level.

4 But he testified he didn't have the
5 access. He said he could cut and parse it. That would
6 be, you could physically cut and paste it, but that
7 would be a tedious and ineffective process, akin to
8 using Wget bypassing the mechanisms. And then Pfc
9 Manning conducted research to do that so he could
10 ex-filtrate it to his personal computer.

11 THE COURT: Was there any policy that said
12 anything that was brought out in the Government's case
13 in chief that said users could not download the GAL or
14 portions of the GAL to their personal computer?

15 CAPTAIN von ELTEN: One second, ma'am.
16 Chief Rearrd testified about the importance of keeping
17 that information safe and the potential malicious uses
18 for that.

19 THE COURT: I asked is there any
20 prohibition on someone downloading .mil addresses to
21 their personal computer. There is for classified

1 information. I understand that. But for the GAL?

2 CAPTAIN von ELTEN: Testimony talked about
3 the acceptable use being taking emails and placing them
4 within your NIPR or your Government computer. There is
5 no testimony that I'm aware it that says it was
6 permissible to take email addresses and place them on
7 your personal computer.

8 THE COURT: Government has got the burden
9 of proof here. Is any testimony it is impermissible to
10 put it on your personal computer?

11 CAPTAIN von ELTEN: Your Honor, the
12 evidence would be that it's not in accordance with Army
13 policy such as 25-2. That where information is
14 supposed to be, not supposed to be misused. Supposed
15 to be used for appropriate uses. That testimony was
16 specifically that PII should not be compromised or
17 widely disseminated. PII, especially in soldiers
18 should be protected.

19 THE COURT: All right. Government, by
20 close of business tomorrow you find me what the record
21 says or what has been in the Government's case in chief

1 presented as evidence that there is some sort of policy
2 or prohibition that people cannot take, download the
3 GAL onto their personal computers.

4 CAPTAIN von ELTEN: Yes, Ma'am.

5 THE COURT: Without mil addresses.

6 CAPTAIN von ELTEN: Chief Nixon testified
7 that the user names remain the same. So while the
8 entire email address might change after a year when
9 someone may be redeployed, the domain part would change
10 but the user name would remain the same, as was
11 testified that the user name is valuable information
12 and subject to misuse.

13 Finally, the Defense cites the Horning
14 case, which is also -- in Horning the issue was,
15 Government presented evidence that the properties were
16 \$50 not the statutory minimum of \$100. And the fact
17 finder was not allowed to infer without additional
18 information that the \$50 value was too low. In that
19 case the Government, evidence that the pawnbroker paid
20 \$50 for it and then argued that everybody knows
21 pawnbrokers underpay for things. Government didn't

1 present evidence how much more somebody would pay, of
2 course, that they weren't allowed to make that
3 argument.

4 In this case United States presented
5 evidence of well in excess of \$1 000. Different means
6 of those.

7 THE COURT: Assume for the sake of
8 argument there is no prohibition against downloading
9 email addresses to a personal computer. That has been
10 proven. Does the Government believe there's an
11 attempt?

12 CAPTAIN von ELTEN: Yes, Ma'am.
13 Absolutely.

14 THE COURT: Why?

15 CAPTAIN von ELTEN: Where Pfc Manning has
16 a prolonged and demonstrated pattern of compromising
17 information to WikiLeaks, WikiLeaks puts out a tweet
18 asking for email addresses and shortly thereafter Pfc
19 Manning, for no apparent reason, creates a pass code
20 saying he wants to ex-filtrate military addresses, does
21 so, takes them to his personal computer. Further, in

1 the ex-filtration task Pfc Manning created also
2 referred to CIDNE in that document which is evidence
3 pass code used before and was used when he wanted to
4 ex-filtrate and compromise the Government information.

5 THE COURT: Ex-filtration task where the
6 in the testimony did it come from what exhibit is it?

7 CAPTAIN von ELTEN: Appellate 122, Ma'am.
8 Testimony of Mr. Johnson. Subject to your questions,
9 Ma'am.

10 THE COURT: I think I have asked them.
11 Thank you.

12 CAPTAIN von ELTEN: Thank you.

13 THE COURT: Any final words, Mr. Coombs?

14 MR. COOMBS: Your Honor. To start of with
15 point of a clarification. The case cited by the
16 Government, the Patone case, I believe you'll see it's
17 not a 641 case.

18 THE COURT: Isn't it referred to by
19 DiJulio in positive terms?

20 MR. COOMBS: Yes. As far as being 641,
21 Defense position is, when you look at those cases they

1 do require you to specifically plead the property.

2 And the reason why that's important
3 obviously is, the Court looks also at the Zell case,
4 4th Circuit case. Shows the difference between how you
5 plead it, and how you value it.

6 In Zell you have got a Navy Defense
7 Appropriation that was copied. And they proved the
8 value by the cost price of the photocopying,
9 transportation of that record and the actual cost of
10 the record.

11 But when you look at what was not
12 allowed, that is important. Defense wanted to get
13 access to the information, to bring out the information
14 within the record.

15 THE COURT: The information in the book?

16 MR. COOMBS: Yes. The content said was
17 irrelevant because information was not charged. So in
18 that case the Defense was trying in discovery to get
19 access to the information within the charge copy and
20 the Court denied that reading in a difference
21 between --

1 THE COURT: Is this the information charge
2 or information not used to determine value.

3 MR. COOMBS: Not charged, Ma'am. So that
4 would be why the Defense would say there is a
5 difference between record, copy record and information
6 under 641. And the Zell case highlights that.

7 THE COURT: What Defense's position with
8 respect to the Government's position there is a
9 distinction between a digital copy and hard copy. That
10 a digital copy isn't really a copy?

11 MR. COOMBS: There's a distinction between
12 digital copy and hard copy. All cases bear that out.
13 Copy of the record can be a record. It's a copy and
14 that's how you would charge it. Photocopy of the
15 record or whatnot.

16 I would disagree that there's no
17 distinction between the original and a copy because
18 it's somehow digital. There is a difference. And that
19 would be important not only for the charging and
20 valuing, but also the theory you go under for either
21 stealing or the wrongful appropriation. Certainly

1 wrongful appropriation there is difference.

2 Conversion is what I meant to say. If
3 the theory was conversion, let's just take the stealing
4 out. The Government discharged these records under a
5 theory of conversion. There would be no way they can
6 argue there is no difference between digital and
7 copying.

8 We would all agree that if he still had
9 copy of it, you know, there's no conversion of it at
10 that point.

11 THE COURT: I'm not following this.

12 MR. COOMBS: The Government just went for
13 a theory of conversion. And they are trying to prove
14 substantial interference. If they still have the copy
15 of whatever it is, let's take it out of the classified
16 realm and simply say whatever copy, Zell case, you got
17 Defense appropriation book, and a copy of it. Never
18 been denied the original possession of it. And
19 testimony, like in this case, has come forward, we used
20 the book same way, hasn't changed at all how we use it.
21 There would be no substantial interference. And the

1 Government couldn't argue that there's no difference
2 between the original and additional copying.

3 Now the copy of it, when you actually
4 charge the copy, then you can argue a substantial
5 interference because now the case law does bear out
6 that when you make a copy of the Government record
7 that's still the Government's property even though you
8 have made the copy. You can have a substantial
9 interference with that, but that's not what the
10 Government has proven here.

11 That goes back to, at least when it
12 comes to 641 offenses, the Supreme Court in Moreset did
13 say, I'll quote it now, probably every stealing is a
14 conversion. Certainly not every known conversion is a
15 stealing. And from the Defense's position the
16 Government have to prove substantial and serious
17 interference regardless of how they go forward.

18 Then just with on the GAL for a moment.
19 The Government is saying, I guess now their theory is,
20 okay, you had the wrongfulness when you put it on your
21 personal computer. I think also just the common sense

1 ways of the world right now, if you go on your personal
2 computer, you can get on AKO, Jack Cnet access to email
3 addresses, are they saying that you can't save email
4 addresses on your personal computer when you can access
5 that information on your personal computer.

6 And so that kind of undercuts that
7 argument that somehow by putting it on the personal
8 computer, that was wrongful.

9 THE COURT: Well, if you can access
10 something on your personal computer, like AKO, and
11 access the addresses, why does that necessarily
12 preclude a regulatory prohibition on downloading those
13 addresses to your personal computer?

14 MR. COOMBS: It wouldn't. If you had that
15 regulation that said, hey, it's wrongful, and there's
16 some reason why perhaps if the Government offered that
17 evidence. When we look back at really what Rearrd
18 testified to, what the line testified to and what's in
19 the expected stipulated testimony for Williamson, they
20 all have the same statements, there was no prohibition
21 on the downloading saving of these email addresses.

1 That's the Government's evidence.

2 And so, when you see what's there they
3 almost kind of for now arguing some sort of quasi 1030
4 argument for the 641 offenses of, because you did have
5 the ability to cut-and-paste, I think what my opposing
6 counsel said was, you could cut-and-paste but that
7 would be a tedious process.

8 But if you actually used, you know, the
9 export function that he figured out, that does it so
10 much faster. Apparently speed at which you do
11 something in the Government's eyes makes it wrongful
12 then for a 641 offense. That's shouldn't work for the
13 1030 offense and that certainly should not work for the
14 641 offense.

15 THE COURT: We'll have to see what the
16 Government presents here. But assume, I guess to even
17 get to the exceed authorized access, if you will,
18 you're on your personal computer. You go to, I assume
19 a NIPR site to get this information. So there would
20 have to be some sort of evidence that there is some
21 sort of prohibition on executable files or a programs

1 or something like that to access the NIPR site.

2 MR. COOMBS: Yes. If you are carrying
3 that 1030 argument and applying to this, yes, you have
4 to have something to say that, when you access this,
5 again, if you are using a 1030 logic, that by doing it
6 in a quicker way, than you could do otherwise by cut
7 and paste, that that's somehow now wrongful.

8 But there's been no evidence to suggest
9 that. And, in fact, the evidence to the contrary. You
10 can do it. And the only person who testified about
11 potential wrongfulness was the person that said, well,
12 it depends on your intent.

13 THE COURT: I said I was going to
14 disregard all that too.

15 MR. COOMBS: Okay. That intent goes
16 towards, again, maybe second part of the Court's
17 questions was, well, could you have an attempt. And
18 then that would be important then to prove a specific
19 intent to commit the offense.

20 THE COURT: And the substantial step.

21 MR. COOMBS: The overt act. The

1 substantial step to accomplish that. You know, the
2 Government points to, okay, he's got these other
3 disclosures, kind of the spillover to try to prove this
4 offense. But you have got these other disclosures and
5 we can show them. Because we have got computer
6 forensics to show them. Everything but the one that
7 he's saying he didn't do. And that's the Prower video.
8 Of course he's saying he gave that video but at a later
9 date.

10 THE COURT: He isn't saying anything for
11 purposes of this --

12 MR. COOMBS: That is correct. He isn't
13 saying anything for this motion or this case at this
14 point. He intends to say that. But here the fact that
15 you have the forensics to show that, here what do we
16 have forensically?

17 We show that he put the information on
18 his computer and then deleted it. It's in the
19 unallocated space. No evidence giving it to anyone.
20 So the evidence actually undercuts any argument of an
21 attempt.

1 THE COURT: The forensics for the other
2 charged offenses that were conducted prior, were they
3 in the deleted or unallocated files?

4 MR. COOMBS: I don't know well enough to
5 tell you that. I'm sorry.

6 THE COURT: Okay. Not your burden.

7 MR. COOMBS: Yes, Ma'am. I'll roll with
8 that. Not my burden. I think when you look at this in
9 totality, the Government has all the issues that the
10 Defense argued in its motion.

11 THE COURT: Thank you. Government, I'll
12 ask you the same question with respect to the prior
13 charged defenses before the GAL. Do the forensics
14 indicate whether the reads, if you will, was in the
15 deleted or unallocated files?

16 CAPTAIN von ELTEN: Yes, they do, Your
17 Honor.

18 MR. MORROW: Your Honor, may I have a
19 moment.

20 Ma'am could you please reask the
21 question.

1 THE COURT: The Defense's position is
2 basically, one of the arguments has been that the
3 forensics show that the GAL was in the deleted files, I
4 believe on Mac and on computer.(inaudible) account in
5 the supply room.

6 Now the Government's position has been,
7 again, arguing the attempt piece now, that the fact
8 that they are in the deleted files doesn't make any
9 difference because there is a pattern, ongoing pattern
10 of disclosures.

11 So I'm asking on prior disclosures, the
12 things that you found, Department of State cables
13 CIDNE, were they found in deleted and unallocated files
14 too?

15 MR. MORROW: Yes, Your Honor.

16 THE COURT: All of them or just some of
17 them?

18 MR. MORROW: With respect to the Prow
19 documents, personal computer remnants, Department of
20 State cables, (inaudible) remnants of the GITMO, some
21 of the GITMO documents, unallocated space on personal

1 computer. Evidence of those.

2 THE COURT: Are they in the deleted spaces
3 or unallocated spaces?

4 MR. MORROW: (inaudible)

5 THE COURT: Okay. Where would I find
6 this?

7 MR. MORROW: You could refer to
8 Mr. Johnson's testimony or I haven't reviewed his
9 report, but I believe his report indicates --

10 THE COURT: Defense exhibit Juliette?

11 MR. MORROW: Yes.

12 (Inaudible)

13 THE COURT: Thank you. Is that the first
14 brief or second brief?

15 CAPTAIN von ELTEN: First brief, Your
16 Honor.

17 THE COURT: Can you get me the case?

18 CAPTAIN von ELTEN: Yes, Ma'am.

19 THE COURT: Is there anything else we need
20 to address at this point? This looks like a good time
21 for lunch break.

1 CAPTAIN von ELTEN: United States requests
2 a two hour lunch break to mark documents for the next
3 round of witnesses.

4 THE COURT: All right. If we start at
5 2:00, Government, enough time?

6 MAJOR FEIN: Yes.

7 THE COURT: Court is in recess until 1400.
8 (Court recessed at 12:21 p.m. for lunch.)

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